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RESPONSE TO THE 2004 REPORT OF THE JUDGES COMPENSATION COMMISSION

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This response filed in the Legislature
with corresponding Notice of Motion
on February 14, 2005
by the Honourable Geoff Plant

FEB 16 2005

Response to the
2004 Report of the Judges Compensation Commission

This document supplements the corresponding motion by presenting the reasons for the rejection of, and substitution of provisions for, specific recommendations of the *Report to the Attorney General of British Columbia and the Chief Judge of the Provincial Court of British Columbia pursuant to section 5(3) of the Judicial Compensation Act, Final Report of the 2004 British Columbia Judges Compensation Commission* (the "Commission Report").

The Judges Compensation Commission is an independent commission mandated by the *Judicial Compensation Act* to make recommendations respecting the remuneration, allowances and benefits of Provincial Court Judges. The current report covers the time period from January 1, 2004, until the end of fiscal year 2007/08.

The process for setting judicial compensation is contained in the *Judicial Compensation Act*. The Legislative Assembly may reject recommendations of a compensation commission as being unfair or unreasonable. Recommendations of this Commission Report which are not specifically rejected by the Legislative Assembly within the time frame set out in the *Act* go into effect beginning on January 1, 2004.

The Commission Report was tabled in the Legislative Assembly on October 7, 2004, and, further to section 6(1)(c) of the *Judicial Compensation Act*, has been tabled again, today, February 9, 2005.

Government must consider the Commission Report in the context of judicial independence, and its responsibility to deal with matters of public interest broadly understood. This includes responsible fiscal management for all of government, and the efficient operation of all parts of government, balancing competing demands and interests.

The Commission Report makes recommendations respecting 16 aspects of judicial remuneration, benefits and allowances. As set out in the motion accompanying this Response, five of these recommendations are rejected, and substitutions made. The remaining recommendations are accepted.

Before considering the Commission Report, it is important to set out the larger legal and historical context. The first part of this document describes the concept of judicial independence and sets out the relevant legislative provisions. Individual recommendations of the Commission

Report are then presented, together with the reasons for rejecting, and making substitutions for, specific recommendations.

A. LEGAL AND HISTORICAL CONTEXT

Independence of the Judiciary

It is a fundamental principle of the Canadian Constitution that the courts must be independent, both from government and from private individuals. The Government of British reemphasizes its respect for and its commitment to the principle of judicial independence, both in its substance and in its spirit.

The historical foundations and the fundamental sources of the principle of judicial independence in the Canadian Constitution were examined at length by the Supreme Court of Canada in the decisions of *Valente v. The Queen* (1985) and *Beauregard v. Canada*, (1986). The discussion of these aspects of this principle continued in the more recent decision in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* ("*Provincial Court Judges Reference*") (1997), a case which is particularly significant with respect to the issue of judicial compensation commissions.

These and other decisions of the Supreme Court of Canada describe how section 11(d) of the *Charter of Rights and Freedoms* and sections 96 to 100 of the *Constitution Act, 1867* have incorporated the principle of judicial independence into this country's *written* constitution. Section 11(d) of the *Charter* specifically states:

> **11.** Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

It was first discussed in the *Beauregard* decision that the principle of judicial independence, which has for centuries been a cornerstone of the constitutional system of the United Kingdom, was transferred to Canada by the language of the preamble to the *Constitution Act, 1867*, which states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". The judgment of Supreme Court of Canada Chief Justice Lamer in *Provincial Court Judges Reference* affirmed that this reference supports the *unwritten* principle of judicial independence which runs through our Constitution:

> Notwithstanding the presence of s.11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an <u>unwritten</u> constitutional principle, in

> the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*.

The importance to our society of this basic principle of our Constitution has been described many times, but perhaps cannot be better stated than it was by Mr. Justice Strayer in a 1994 decision of the Federal Court of Canada, *Gratton v. Canada (Judicial Council)*:

> [The] independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour.

The Supreme Court of Canada has described how judicial independence is comprised of three essential conditions: security of tenure, financial security and administrative independence. Each of these components has been the subject of careful analysis by that Court.

The *Provincial Court Judges Reference* decision affirmed, as a constitutional requirement for financial security, that judges' remuneration must not become the subject of negotiation between the judiciary and the government. Instead it must be established through a process which incorporates an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration.

Provincial Court Judges

Provincial Court Judges are appointed pursuant to section 6 of the *Provincial Court Act*. The Provincial Court of British Columbia has broad jurisdiction. While the Provincial Court's work is primarily in criminal law, the judges also routinely hear family law, child protection and civil matters.

As of February 3, 2005, there are 133 full-time and 16 part-time Provincial Court Judges.

Relevant Provisions of the *Judicial Compensation Act*

The *Judicial Compensation Act* requires the Judges Compensation Commission to consider several factors before making recommendations with respect to judges' remuneration, allowances and benefits. Section 5(5) of that *Act* says:

> **5.** (5) In preparing a report, a commission must consider all of the following:
>
> (a) the current financial position of the government;
>
> (b) the need to provide reasonable compensation to the judges [...];
>
> (c) the need to maintain a strong court by attracting qualified applicants;
>
> (d) the laws of British Columbia;
>
> (e) any matter the commission considers relevant.

In accordance with section 2 of the *Act*, the present Judges Compensation Commission was appointed on March 1, 2004. Its members were Chair George L. Morfitt, Vince Collins and Christopher M. Considine, Q.C.

The Commission's responsibility, pursuant to section 5(1) of the *Act*, together with the transitional provision in section 26(1), was to report on and make recommendations with respect to remuneration, allowances and benefits of judges for each of the fiscal years, 2004-2005, 2005-2006, 2006-2007 and 2007-2008. The transitional provision in section 26(1) required that this Commission also make recommendations for the first three months of 2004.

The *Act*, section 6(2) provides that the Legislative Assembly may, by a resolution passed within 28 sitting days after the date on which the report is laid before the Legislative Assembly (in this case, the resolution must be passed by the 28th sitting day after February 9, 2005):

> **6.** (2)(a) reject one or more of the recommendations made in the report as being unfair or unreasonable, and
>
> (b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

The *Judicial Compensation Act* specifies further that if a recommendation is not rejected by the Legislative Assembly within the time limit, the judges are entitled to receive the remuneration, allowances and benefits proposed by that recommendation, beginning, with respect to this

Commission Report, on January 1, 2004. If the Legislative Assembly does resolve to reject a recommendation, then the substituted remuneration, allowance or benefit goes into effect beginning on January 1, 2004.

B. COMMISSION REPORT AND RESPONSE

COMMISSION SALARY RECOMMENDATIONS

The Commission made the following recommendations respecting the salaries of Provincial Court Judges:

1. Cost of living increase for January 1, 2004 until March 31, 2005, based on current salary of $161,250. (Increase to be the change in the British Columbia CPI (the "BC-CPI") over the period of January 1, 2003 – December 31, 2003);

2. Second cost of living increase for fiscal year 2005/06 (Increase to be the change in BC-CPI from January 1, 2004 to March 31, 2005);

3. Increase for 2006/07 to $198,000;

4. Increase for 2007/08 to $198, 000 plus the change in BC-CPI from April 1, 2006 to March 31, 2007;

5. Salary differential for the Chief Judge and for Associate Chief Judges of an additional 12 percent and 6 percent over and above the salary amount paid to regular Provincial Court Judges;

6. Salary differentials for Chief Judge and Associate Chief Judges to be retained when they leave office and resume duties as regular Provincial Court Judges.

Response to Commission Salary Recommendations

The recommended salary increases for January 1, 2004 – March 31, 2005, and for 2005/06 are rejected as unreasonable and unfair. (*Recommendations 1 and 2 above*).

The recommended salary increases for 2006/07 and 2007/08 are accepted. (*Recommendations 3 and 4 above*).

The recommended salary differentials for the Chief Judge and for Associate Chief Judges are accepted. (*Recommendation 5 above*).

The recommendation that these differentials be retained when an incumbent leaves office and resumes duties as a regular judge is rejected as unreasonable and unfair. (*Recommendation 6 above*).

Substitutions for Recommendations 1 and 2 and Reasons

The salaries for Provincial Court Judges will be kept at the current level of $161,250 from January 1, 2004, until the end of fiscal year 2005/06.

The recommended salary increases are rejected, and zero increases substituted for the time in question for the following reasons.

First, rejecting the recommended increases for 2004/05 and 2005/06 and accepting the recommendations for 2006/07 and 2007/08 is consistent with the Commission's underlying reasoning. The Commission recognized that a measure of restraint is appropriate in the short term, and went on to say:

> "In the latter two years of the (Commission's) mandate, we are confident that the government's disciplined budget policies will have solidified economic recovery, and larger salaries will be affordable". [Report, p. 17].

Second, this is also consistent with the government's public sector compensation policy. This policy, which mandates zero increases until the end of the 2005/06 fiscal year, is an across-the-board measure affecting substantially every person who is paid from the public purse. This policy plays a significant role in the "disciplined budget policies" that permit the government to accept the larger salary increases recommended by the Commission for 2006/07 and 2007/08.

Moreover, this response will result in judges' salaries reaching the same end point recommended by the Commission, ($198,000 plus BC-CPI increase). It would be unfair to contravene the public sector compensation policy and provide judges with salary increases before 2006/07. There are no compelling reasons that would justify such inequity.

The current salary meets the requirement that judicial salaries should be sufficient to continue to attract a high level of candidates. The Commission found that:

> "...there is no evidence to suggest that the present levels of salaries and benefits offered to Provincial Court Judges are inadequate to attract or retain properly qualified candidates." [Report, p.25]

Maintaining the current salary of $161,250 without an increase until 2006/07 will not result in a salary level that falls below a minimum level that makes it difficult to continue to attract a high level of candidates.

Under these circumstances, and in light of the public sector compensation policy that affects substantially all who are paid out of the public purse, it would be unreasonable and unfair to increase Provincial Court Judges' salaries before 2006/07 and 2007/08.

Substitutions for Recommendation 6 and Reasons

Salary differentials will not be retained when an incumbent leaves office as Chief Judge or as an Associate Chief Judge.

The Commission did not offer reasons for recommending that salary differentials be retained even after the incumbent is no longer performing the duties of a Chief Judge or an Associate Chief Judge. However, this policy would be patently unfair, potentially creating two classes of regular Provincial Court Judges and causing spiralling costs as judges move in and out of administrative positions. Finally, such a policy would be unreasonable and contrary to the general principle that remuneration should reflect actual duties performed.

COMMISSION RECOMMENDATIONS RESPECTING BENEFITS

The Commission made the following recommendations respecting benefits for Provincial Court Judges:

7. No changes to the benefits for retired judges;

8. With the exception of MSP and Pharmacare and other plans of general application to the public, no change to be made to judges' benefits, payment of any premium or fee, or term of a benefit plan, without prior consideration by a Judge's Compensation Commission;

9. No changes to the medical plan related to judges with respect to travel and accommodation costs for treatment;

10. The judges' allowance for professional development be raised from $2000 to $3000 per judge per annum, and a one-year carry-over of any unused portion of the allowance be permitted;

11. The allowances continue to be administered through the Chief Judge's Office, subject to her sole discretion to approve "incidental expenses incurred by a judge for the fit and proper execution of his or her office".

Response to Commission Benefits Recommendations

The Commission's recommendations respecting benefits for retired and sitting judges set out in recommendations 7, 8 and 9 above are accepted.

The recommendations respecting the judges' annual professional development allowance, and its administration are rejected. (*Recommendations 10 and 11 above*).

Substitutions for Recommendations 10 and 11 and Reasons

- **No change to the professional development allowance amount and administration until April 1, 2005.**

- **Beginning April 1, 2005, the judges' professional development allowance will be $3000 per judge per annum, with a one-year carry-over of any unused portion of the allowance permitted.**

- **Beginning April 1, 2005, subject to the discretion of the Chief Judge, and administered through the Office of the Chief Judge, the professional development allowance may be used to reimburse the following expenses incurred by a judge for professional development related to the duties of a Provincial Court Judge:**
    a. **Books, periodicals and subscriptions;**
    b. **Computer software;**
    c. **Internet access fees;**
    d. **Professional association membership dues;**
    e. **Courses, seminars and conferences, including travel and expenses incidental to attendance.**

The recommended increase in the professional development allowance is supported, as is the administration of these allowances through the

Office of the Chief Judge. However, since the recommended scope of the professional development allowance is rejected, it would be impractical to implement the increase in professional development allowance retroactively. The substitute provisions will enable smoother transition to the adjusted professional development allowance regime.

The recommended scope of the professional development allowance is rejected on the grounds it is unreasonable and unfair.

The professional development allowance was implemented on the recommendation of the 1998 Judicial Compensation Committee. The Commission recommended that each judge receive an annual allowance for professional development in the amount of $2000 (Judicial Compensation Committee, 1998, p. 23, emphasis added). The 2004 Commission has clarified that the allowance is intended for matters related to professional development, and is not an auxiliary fund for general operating expenses.

However, the 2004 Commission recommendations would also continue the current scope of the professional development allowance. This is reported by the Commission to be based on guidelines modelled on the federal judges' professional allowance, and to permit the reimbursement of expenses "incurred by a judge for the fit and proper execution of his or her office" [Commission Report, p.30]. According to the Commission Report, this has resulted in expenses being reimbursed that are not solely related to judicial education.

It is unreasonable and unfair for judges to have a professional development allowance that allows them to be reimbursed for expenses that go beyond professional development. The substituted scope is consistent with the intent of the 1998 recommendations, with the clarification provided by the 2004 Commission, and with a standard definition of professional development expenses.

OTHER COMMISSION RECOMMENDATIONS

The government accepts the remainder of the substantive recommendations made by the Commission, namely:

12. Continue the senior judge's part-time program (described in the *Provincial Court Act* and the *Judicial Compensation Act);*

13. Address anomalies respecting the actual mandatory retirement age of judges (age 70) and provisions of the federal *Income Tax Act* (age 69);

14. Permit judges who have maximized their pension contributions to contribute to RRSPs;

15. Remove the six-month waiting period for benefits upon appointment.

COMMISSION COST RECOMMENDATIONS

The Commission recommended that government reimburse the Provincial Court Judges' Association of British Columbia for all of the costs attendant on their involvement in the Commission processes.

This recommendation is accepted.